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Issue date: 19Nov2002

BRB No.: 01-0535
Case No.: 2000-LHC-0386
OWCP No.: 1-140289

In the Matter of:

DAVID S. FAULKINGHAM
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insurer

APPEARANCES:

Marcia J. Cleveland, Esq.
For the Claimant

Carol G. McMannus, Esq.
For the Employer/Self-Insurer

BEFORE: **DAVID W. DI NARDI**
District Chief Judge

DECISION and ORDER ON REMAND - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on April 19, 2000 in Portland, Maine, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit, EX for a Carrier's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

PROCEDURAL HISTORY

This Administrative Law Judge, by **Decision and Order Awarding Benefits** issued on December 19, 2000, awarded Claimant benefits for his temporary total disability and the Employer timely filed an appeal thereof. The Benefits Review Board, by **Decision and Order**

issued on March 12, 2002, reversed and remanded the claim to this Administrative Law Judge for further proceedings.

As the Board's decision is non-published, I shall quote liberally from the decision for ease of reference by the parties and reviewing authorities, beginning on page two thereof:

"Prior to issuing his decision, by Order dated August 10, 2000, the administrative law judge admitted post-hearing evidence submitted by claimant showing Dr. Wickenden's recommendation on June 8, 2000, that claimant undergo total replacement surgery for his right knee condition, and employer's July 11, 2000, letter authorizing the procedure. The administrative law judge provided employer with 30 days to respond to this evidence. In his decision, the administrative law judge found that claimant is unable to return to his usual employment and that his bilateral knee condition has not reached maximum medical improvement. The administrative law judge rejected employer's labor market survey and found that employer failed to establish the availability of suitable alternate employment. The administrative law judge thus awarded claimant ongoing temporary total disability benefits from June 26, 1997. The administrative law judge denied employer's motion for reconsideration.

"On appeal, employer contends the administrative law judge erred by admitting claimant's post-hearing evidence. Employer also asserts the administrative law judge erred in finding that claimant's knee injuries have not reached maximum medical improvement, and in finding that employer failed to establish the availability of suitable alternate employment. Claimant responds, urging affirmance.

"Employer asserts it was prejudiced by the administrative law judge's post-hearing admission of evidence regarding claimant's pending knee replacement surgery. Specifically, employer contends that claimant was able to review all the evidence and testimony presented at the formal hearing before submitting evidence of his prospective knee surgery. Moreover, employer contends that the administrative law judge failed to comply with 29 C.F.R. §18.55 regarding the timely submission of evidence, by not finding good cause for admitting evidence post-hearing. Employer argues the administrative law judge also failed to find that the evidence was new, relevant, and material, pursuant to 29 C.F.R. §18.54 and 20 C.F.R. §702.338. An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if they are shown to be arbitrary, capricious, or an abuse of discretion. **Cooper v. Offshore Pipelines International, Inc.**, 33 BRBS 46 (1999); **Raimer v. Willamette Iron & Steel Co.**, 21 BRBS 98 (1988). In his August 10, 2000, Order, the administrative law judge rejected employer's objection to claimant's request to admit post-

hearing evidence, and he gave employer 30 days to respond to claimant's evidence.

"Initially, we reject employer's reliance on the regulations at 29 C.F.R. §§ 18.54, 18.55, as the specific regulations promulgated under the Act, 20 C.F.R. §§ 702.338, 702.339, are applicable here.[1] 29 C.F.R. §18.1; **Wayland v. Moore Dry Dock**, 21 BRBS 177 (988). In this case the administrative law judge specifically stated that the record had not closed at the time the post-hearing evidence was admitted, **see** Decision on Motion for Reconsideration at 1, and claimant's submission thus was not untimely.[2] Under the facts of this case, any error is harmless in the administrative law judge's not making a specific finding that claimant's evidence is relevant and material under Section 702.338, as the evidence clearly falls within this standard. Moreover, employer was given an opportunity to respond to the evidence, and employer thus has not shown any prejudice by its admission. **See Parks v. Newport News Shipbuilding & Dry Dock Co.**, 32 BRBS 90 (1998), **aff'd mem.**, 202 F.3d 259 (4th Cir. 1999)(table). Accordingly, employer has not established that the administrative law judge abused his discretion in admitting claimant's post-hearing evidence. **Olsen v. Triple A Machine Shops, Inc.**, 25 BRBS 40 (1991), **aff'd mem. sub nom. Olsen v. Director, OWCP**, 996 F.2d 1226 (9th Cir. 1993).

"We next address employer's challenge to the administrative law judge's finding that claimant's bilateral knee condition has not reached maximum medical improvement. We agree that this finding cannot be affirmed as the administrative law judge did not render adequate findings of fact with respect to the conflicting evidence of record. The determination of when maximum medical

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[1]Section 702.338 states that the administrative law judge "shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters." Section 702.339 states that the administrative law judge is not bound by formal rules of evidence but "may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties." **See also** 33 U.S.C. §923.

[2]Thus, employer's reliance on 29 C.F.R. §18.54 is misplaced, as that section provides for the close of the record at the conclusion of the hearing "unless the administrative law judge directs otherwise." As the administrative law judge here held the record open for post-hearing evidence and briefs, this is not a case involving submission of documents after the close of the record, and the remainder of Section 18.54, as well as 29 C.F.R. §18.55, does not apply.

improvement is reached is primarily a question of fact based on medical evidence. **Eckley v. Fibrex & Shipping Co., Inc.**, 21 BRBS 120 (1988); **Ballesteros v. Willamette W. Corp.**, 20 BRBS 184 (1988). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969), or if he has any residual impairment after reaching maximum medical improvement, the date of which is determined by medical evidence. **See generally Louisianan Ins. Guar. Ass'n v. Abbott**, 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994).

"In the instant case, the administrative law judge summarily stated that claimant's knee condition has not reached maximum medical improvement "because of his recent surgery and because he has not recovered therefrom." Decision and Order at 29. The fact that claimant had surgery, however, does not preclude the possibility that claimant's condition had been permanent during an earlier pre-surgical period of time. **See generally Leech v. Service Engineering Co.**, 15 BRBS 18 (1982) (permanent partial disability lapses during subsequent period of temporary total disability, but does not disappear). Moreover, the mere fact of surgery does not compel the finding that claimant's condition is temporary, although the evidence may warrant such a finding. **See Kuhn v. Associated Press**, 16 BRBS 46 (1983); **see also Bunge Corp. v. Carlisle**, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 2000 (1986); **White x. Exxon Corp.**, 9 BRBS 138 (1978), **aff'd mem.**, 617 F.2d 292 (5th Cir. 1982).

"In this case, the administrative law judge did not discuss the medical evidence relevant to whether claimant's condition was temporary or permanent at various points in time. Dr. Wickenden's January 9, 1998, report stated that claimant's knees had reached maximum medical improvement, and he assigned claimant permanent work restrictions. EX 4 at 8. Moreover, on April 23, 1998, Dr. Wickenden rated claimant's knees under the American Medical Association **Guides to the Evaluation of Permanent Impairment**, CX 12, as did Dr. Brigham on November 9, 1998, EX 2 at 3. Dr. Wickenden stated in his deposition testimony that claimant's degenerative arthritis will only worsen and that his treatment was not curative but designed to alleviate claimant's symptoms of pain, stiffness and swelling. CX 14 at 7, 9-12. Dr. Wickenden also testified that knee replacement surgery will treat claimant's symptoms, and that claimant's work restrictions may also be lessened. CX 14 at 16. As the administrative law judge did not fully consider the evidence of record in light of relevant law, we must vacate the administrative law judge's finding that claimant's bilateral knee condition has not reached maximum medical improvement, and we remand this case to the administrative law

judge for reconsideration of this issue.

"We next address employer's contention that the administrative law judge erred by finding that employer failed to establish the availability of suitable alternate employment. Where, as here, it is uncontested that claimant is unable to return to his usual employment, the burden shifts to employer to establish the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing. **CNA Ins. Co. v. Legrow**, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); **Palumbo v. Director, OWCP**, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). In addressing this issue, the administrative law judge must compare claimant's physical restrictions with the requirements of the positions identified by employer in order to determine whether employer has met its burden. **See Hernandez v. National Steel & Shipbuilding Co.**, 32 BRBS 109 (1998). A claimant can rebut employer's showing of suitable alternate employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment shown by employer to be suitable and available. **See Palumbo**, 937 F.2d 70, 25 BRBS 1(CRT).

"In rejecting employer's labor market survey, the administrative law judge found that employer's vocational consultant, Arthur Stevens, Jr., failed to consider claimant's limited ability to commute due to his knee condition, Tr. 30-31, 51-52, and that Mr. Stevens misconstrued Dr. Wickenden's sitting and standing restriction as allowing claimant to continuously sit and stand for two hours or more. Dr. Wickenden stated that claimant is limited to one hour of continuous standing and sitting. **Compare** CX 15 at 6 **with** CX 14 at 15. The administrative law judge credited Dr. Wickenden's testimony that claimant should work fewer than 40 hours per week. CX 14 at 27. The administrative law judge also credited claimant's testimony and that of Dr. Wickenden to find unsuitable specific positions identified in the survey as a security guard job at MBNA and a greeter position at Wal-Mart, as these jobs require more standing and walking than reported by Mr. Stevens or than is within claimant's restrictions. **Compare** EX 6 at 17, 45, 48, 56 **with** Tr. at 25; CX 14 at 27-28, 32-33. We affirm these findings of the administrative law judge as they are rational and supported by substantial evidence. **See generally White v. Peterson Boatbuilding Co.**, 29 BRBS 1 (1995); **Uglesich v. Stevedoring Services of America**, 24 BBS 180 (1991); **Dupre v. Cape Romain Contractors, Inc.**, 23 BRBS 86 (1989).

"However, we hold that the administrative law judge erroneously rejected other positions identified in employer's labor market survey based on a finding that he could not determine which employers in Mr. Steven's labor market survey were contacted solely by telephone and which he personally visited in order to ascertain

the physical requirements of the reported position. The labor market survey describes in a separately delineated section those reported jobs which were observed and the duration of each observation. EX 6 at 49-68. Moreover, employer is not obligated to present evidence that the physical requirements of the prospective jobs were personally observed if the job requirements are otherwise known. **See generally Universal Maritime Corp. v. Moore**, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge also erred by rejecting employer's labor market survey on the basis that there is no specific information addressing the job duties of the identified positions or whether the jobs are within the restrictions proscribed by Dr. Wickenden. The section of the survey listing the observed jobs also states the specific physical requirements of those jobs. EX 6 at 49-68. Moreover, elsewhere in the survey are job descriptions of the observed positions, including general physical requirements, as well as those positions that Mr. Stevens identified by telephone. EX 6 at 14-48. In this respect, it is the administrative law judge's function to determine claimant's medical and vocational restrictions and compare the restrictions with the specific job duties and physical requirements of the prospective job openings.[3] **See Hernandez**, 32 BRBS 109.

"Mr. Stevens's job labor market survey contains a general job description and the specific physical requirements of five, part-time jobs in Rockland, Maine, a commute of approximately eight miles from claimant's home, CX 15 at 10, that Mr. Stevens personally observed and he testified are appropriate for claimant: cell phone sales, EX 6 at 15, 53; two video store clerk jobs, EX 16 at 16, 54-55; cashier, EX 15 at 21, 63; and, grocery store clerk, EX 6 at 32, 66; **see also** CX 15 at 10, 18-20. The administrative law judge's rational rejection of the MBNA and Wal-Mart positions based on claimant's testimony and Dr. Wickenden's opinion does not address the suitability of these five other jobs. Accordingly, as the administrative law judge did not fully discuss the evidence of record on this issue, we vacate the administrative law judge's conclusion that employer failed to establish the availability of suitable alternate employment, and we remand the case for further findings. **Hernandez**, 32 BRBS 109.

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[3]The administrative law judge also credited claimant's testimony that he contacted some of the employer listed in the labor market survey. Decision and Order at 35. To determine whether claimant rebutted employer's evidence of suitable alternate employment, the administrative law judge is required to make specific findings regarding the nature and sufficiency of the job search undertaken by claimant in order to establish whether the job search was, in fact, diligent. **See Palombo**, 937 F.2d 70, 25 BRBS 1(CRT); **Livingston v. Jacksonville Shipyards, Inc.**, 32 BARBS 123 (1998).

"Accordingly, the administrative law judge's award of temporary total disability benefits is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's decisions are affirmed."

The parties were advised by **ORDER** issued on July 10, 2002 that the record had been docketed at the Boston District and the parties were given thirty (30) days to resolve the matter voluntarily. (ALJ EX A) The parties were also sent a copy of certain correspondence mailed to the Boston District by the Claimant. The correspondence, undated, was docketed by our Docket Clerk on April 3, 2002 and placed unread in our office file pertaining to this claim to await arrival of the record from the Board. The correspondence was noticed by my law clerk on July 10, 2002, at which time she was preparing ALJ EX A. It was decided to send copies thereof to both counsel for their comments. Such correspondence has not been read by this Administrative Law Judge at any time. I note that the correspondence was docketed at the Boston District approximately three (3) weeks **AFTER** the Board's decision and not subsequent to the Employer's filing of a Notice of Appeal with the Benefits Review Board, as alleged by Employer's counsel in her July 24, 2002 reply. (EX A). Claimant's reply, dated August 2, 2002, was filed on August 6, 2002. (CX A) ALJ EX B is the **ORDER** I issued on August 5, 2002 denying the Employer's motion that I recuse myself in this case because of this Court's receipt of the correspondence from the Claimant. That **ORDER** speaks for itself and is incorporated herein by reference. That correspondence has been placed in the rejected evidence file.

Employer's status report was filed on August 12, 2002. (EX B) Claimant's post-remand brief was filed on September 16, 2002 (CX B) and the Employer's brief was filed on September 18, 2002, at which time the record was closed.

The Findings of Fact and Conclusions of Law made in my December 19, 2000 decision, to the extent not disturbed by the Board, are incorporated herein by reference and as if stated herein **in extenso** and will be reiterated herein only for purposes of clarity and to deal with the Board's specific directions to me.[4]

SUMMARY OF THE EVIDENCE

David Faulkingham ("Claimant") worked as an electrician at

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[4]In the interests of judicial efficiency and of expediting this decision, as I shall be retiring shortly, I have adopted certain portion of the parties' post-remand briefs. Such adoption, **ipso facto,** means a rejection of a party's opposing viewpoint on a particular issue.

Bath Iron Works ("Employer") for 21 years. Throughout those years he worked on board ships crawling and kneeling much of the time. Eventually the cartilage in his knees wore out and he experienced weakness and a lot of pain. He went out of work in June of 1997 and has never worked again. After three years of conservative treatment he had a right knee replacement in August of 2000, several months after the hearing in this matter. Replacement of his left knee is anticipated.

As noted above, this Administrative Law Judge awarded Claimant temporary total disability benefits for his bilateral knee problems.

Claimant was 64 years old at the time of the hearing. He first went to work at Bath Iron Works in 1968. He worked for approximately two years, left for eight years, and returned sometime in 1978. Throughout his career at Bath Iron Works, he has worked as an electrician. He continued to work in that occupation until June of 1997 when he left to have arthroscopic surgery on his knee. The incident that precipitated his departure from Bath Iron Works occurred on April 2, 1997. He was walking down a set of ladders onboard ship when his right knee gave way and he had to break his fall by grabbing a hand railing. (TR at 18-22, 26-27, 3 1-32; CX-9, CX-3; CX-4, CX-13 Employee Statement of Injury, April 2, 1997; CX-15 at 5)

Claimant's knee problems were caused by kneeling on steel plates while he pulled cables up from below and from continually climbing up and down ladders onboard ship. He testified that he had to do these two things approximately 80% of the time while he was working at Bath Iron Works. After more than 20 years of using his knees in this way, he has developed severe cartilage damage and osteoencrosis in both knees. He suffers constant pain in his knees and episodes of weakness and collapse. (TR at 19-22; CX-15 at 5-6)

Dr. Wickenden, his treating physician, has placed limits on him, based primarily on pain. Dr. Wickenden has prohibited him from sitting or standing for a prolonged time which the doctor defined as no more than an hour at a time. The limits also prohibit Claimant from any kneeling, squatting, crawling, climbing ladders or stairs, or lifting more than 15 pounds. (TR 30-38, 39-42; CX-12, M-l's dated 5/8/97 - 4/8/00; CX-14 at 15; CX-15 at 18-19) The Employer does not dispute that Claimant can no longer do his usual work as an electrician. It is also undisputed that Bath Iron Works has put him out of work with "no work available within his limitations."

The Employer has introduced into evidence a labor market survey done by Arthur Stevens, Jr. Mr. Stevens, in doing his study, assumed that Claimant could sit or stand for two hours at a time. (CX-15 at 5-6) Many of the jobs listed in the survey do not give sufficient information to establish a residual earning

capacity. (Labor Market Survey C2, C-8, C-9, C-b, C-11, C-12, C-14, C-16, C-17, C-20, C-22, C-23, C-24, *C-25,* C-26, C27, C-28, C-29, C-30, C-31, C-33, C-34, C-35) Of the jobs that did give wage and hour information, many were too far for Claimant to commute. (Labor Market Survey, C-1, C-21, C-22, C-23, C-24, C-25, C-26, C-29, C-30, C-32, C-33; CX-14 at 23-*25,* 33-34; *CX-15* at 9-10). The rest of the jobs were either jobs for which Mr. Faulkingham has no qualifications or transferable skills, such as working in a video store or at a hotel, or were not within his limits, according to the Claimant. (CX-15 at 7-9)

Claimant submits that Dr. Wickenden has opined that some of the jobs that might seem on the surface to be within Claimant's limits, for example being a greeter at WalMart, or a cashier at a Puffin′ Stop, were not in fact within his limits. Dr. Wickenden, based on his experience with other patients, testified that both of those jobs require a great deal of standing and climbing, and hard use of the knees. Claimant also contacted many of the listed jobs and found much the same thing. For example, in his conversation with MBNA he learned that any security guard would be expected to walk around the building and grounds. There was no job for someone just to sit at a front desk, according to Claimant. (CX-14 at 26-29, 32-33; TR at 25-29)

Since his initial arthroscopy, Claimant has had ongoing treatment of his knee problems. He has had all of the conservative treatment available. The arthroscopy removed cartilage tears and loose pieces. He has had cortisone shots and, at the time of the hearing, he was undergoing Synvisc injections, which are synthetic lubricant injections into the knees to relieve pain. However, Dr. Wickenden testified that in Claimant's case, total knee replacement was inevitable." When the patient can no longer tolerate the pain of his knee condition, he recommends total knee replacement. In fact, in this case Claimant had total knee replacement on his right knee in August of 2000, three months after the hearing. (TR at 23-25, 36-38; CX-14 at 9-16)

As already noted above, the Claimant has requested temporary total disability relative to an April 7, 1997 gradual injury to both knees that occurred in the course and scope of his maritime employment. The Claimant requested a finding of temporary total disability based on his intent to obtain total knee replacements in both knees. The Employer's position is that the Claimant's condition is of a permanent nature and that he is entitled to permanent partial disability benefits, based on the availability of suitable alternate employment.

The record reflects that the Claimant was paid temporary total benefits from June 26, 1997 to January 8, 1998. He was subsequently paid permanent partial disability benefits for 78 weeks, commencing January 9, 1998, reflecting a permanent impairment rating of 13.5% for impairment to both knees. This

payment was based on the January 9, 1998 medical opinion of the Claimant's treating physician, Dr. Roger Wickenden, finding the Claimant to be at a point of maximum medical improvement, and the November 9, 1998 permanent impairment report of Dr. Christopher Brigham. The medical records reveal that Dr. Wickenden was fully aware of the potential for total knee replacements when he assessed maximum medical improvement.

As of October 28, 1997, the restrictions imposed by Dr. Wickenden consisted of avoiding kneeling, squatting, crawling, no use of ladders, and no use of scaffolding. The Claimant could ascend and descend one flight of stairs per eight-hour shift and could lift no greater than 15 pounds. At the time of his deposition, Dr. Wickenden clarified that the actual lifting restriction was that the Claimant should not lift greater than 15 pounds on a repetitive basis, which would consist of approximately five times per hour. CX 14 at 19. Additionally, on November 30, 1998, Dr. Wickenden added the restriction of avoiding sitting or standing for prolonged periods without putting the claimant's knee through a range of motion.

Dr. Wickenden testified that the Claimant's restrictions might change subsequent to a total knee replacement, in that the Claimant could sit more comfortably, could perhaps climb stairs more repetitively, and may be able to walk longer distances more comfortably; however, he would still not be able to climb. CX 14 at 16. The Claimant provided no evidence to suggest that his lifting capacity would increase, or that he would be able to kneel, squat, crawl or use ladders after a total knee replacement.

As noted above, this Administrative Law Judge concluded that the Claimant was temporarily and totally disabled until such time as he recovered from his bilateral knee surgeries. Payment of temporary total incapacity benefits was recommenced pursuant to that Order. On January 8, 2001, the Employer submitted its timely Petition for Reconsideration of the underlying December 19, 2000 Order. This ALJ's Decision on Motion for Reconsideration, dated February 15, 2001, denied the Employer's Motion. A timely Petition for Review was filed by the Employer.

The Benefits Review Board issued a Decision and Order on March 12, 2002, vacating the administrative law judge's award of temporary total disability and remanding for further consideration consistent with that opinion. Specifically, the BRB found that the administrative law judge did not fully consider the evidence of record in light of relevant law with regard to his finding that the Claimant's bilateral knee condition had not reached maximum medical improvement. Additionally, the BRB found that the administrative law judge did not fully discuss the evidence of record relating to the suitability of five specific jobs outlined in the Labor Market Survey as they pertain to the availability of suitable alternate employment.

The Benefits Review Board, however, did affirm this administrative law judge's finding that the Claimant was subject to a limited commute, that the Claimant was limited to one hour of continuous sitting or standing, and that the Claimant should work fewer than forty (40) hours per week. Also affirmed were the findings that the security guard position at MBNA and the greeter position at Wal-Mart were not suitable, as they required more standing and walking than was permitted by the Claimant's restrictions.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Additional Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of**

Workers' Compensation Programs, U.S. Dep't of Labor, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate**

Stevedoring Co., 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to negate the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by substantial evidence to the contrary offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not “play a significant role” in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee’s condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which negates the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant’s pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The probative testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP,** 153 F.3d

1051, **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his bilateral knee problems, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszicwicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves

and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

In view of the foregoing, I again find and conclude that Claimant sustained a gradual injury to both knees on or about April 7, 1997 as a direct result of his maritime employment at the shipyard for approximately twenty-one (21) years, beginning in 1968, that the Employer had timely notice of such injury and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant’s disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled**

Industries, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to any work at the shipyard. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did submit substantial evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability until the date of the Employer's

Labor Market Survey, as further discussed below.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8

BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

The Claimant contends that his knee condition is temporary until he recovers from knee surgery, because his disability is caused almost entirely by pain. Knee surgery eliminates the pain and is therefore clearly curative in nature and will result in substantial improvement in his symptoms and reduce his level of disability.

An injury is considered temporary under Longshore as long as the patient is looking forward to treatment, that will bring about substantial improvement in his condition. This is particularly true if surgery is anticipated. Maximum medical improvement is not reached until there is no reasonable prospect of further improvement. **Kuhn v. Associated Press**, 16 BRBS 46, 48 (1983)(condition not permanent when further surgery is anticipated); **Walker v. National Steel & Shipbuilding**, 8 BRBS 525, 528 (1978) (injury does not become permanent until after healing after surgery)

In this case, Claimant submits that he has not reached maximum medical improvement because at the time of the hearing he had one more treatment, total knee replacement, which has a strong probability of bringing about significant improvement in his pain and the functioning of his knees. Dr. Wickenden testified that Claimant’s limits are mostly derived from the pain he experiences and that the function of total knee replacement is to eliminate that pain. Total knee replacement surgery is done only as a last

resort because it is the most drastic treatment. In this case, Dr. Wickenden described it as "inevitable" when he testified by deposition shortly before the hearing. It was apparent from Claimant's testimony and Dr. Wickenden's testimony that total knee replacement surgery was imminent at the time of the hearing and in fact the surgery was done on his right knee in August. (CX-14 at 2-13)

Claimant submits that the Employer relies on an old letter of Dr. Wickenden's from 1998, which gave an impairment rating on Claimant's condition, but did not state that Claimant was at maximum medical improvement. When Dr. Wickenden testified by way of deposition in April of 2000, he made it very clear that treatment was ongoing and that there was a significant prospect of improvement for Claimant, either from the Synvisc injections, which at that time he had not had enough time to evaluate, or ultimately from total knee replacement surgery which would, with a degree of certainty, remove Claimant's pain, which is his most disabling symptom.

Claimant also posits that Employer relies on the opinion of Dr. Christopher Brigham that gave the Claimant a "permanent" impairment rating for his knees. But it is clear from Dr. Brigham's report that he was asked to provide an impairment rating on the assumption that Claimant's injury was permanent. His conclusion that Claimant was at maximum medical improvement was a cursory one sentence opinion. He shows no knowledge of the legal definition of maximum medical improvement under the Longshore Act and does not discuss what factors lead him to the conclusion that MMI had been reached. The fact that he provides a whole person impairment, which is not relevant in a Longshore opinion, suggests he thought his opinion was being used in a state Act case.

I originally held that the overwhelming weight of the evidence supported this Administrative Law Judge's conclusion that Claimant had not reached maximum medical improvement at the time of the hearing and that he would not reach that point until he has recovered from knee replacement surgery on both of his knees. **See Walker v. National Steel & Shipbuilding Co.**, 8 BRBS 525, 528 (1978)

This Judge, in so concluding, recognized that an employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Losada v. General Dynamics Corp**., 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. Tex. 1968), **cert. denied**, 394 U.S. 976 (1969), held that an employee is "permanently disabled when his condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits

a normal healing period." **Id**. at 654.

However, the Board has held that the possibility of a total knee replacement does not preclude a finding that a claimant has reached maximum medical improvement. **Morales v. General Dynamics Corp.**, 16 BRBS 293 (July 27, 1984); **Trask v. Lockheed Ship Building & Construction Co.**, 17 BRBS 56 (1985). It has also been stated that the prognosis that a claimant may improve in the future does not support a finding that the claimant has not yet reached maximum medical improvement. **Brown v. Bethlehem Steel Corp**., 19 BRBS 200 (February 13, 1987); **Ion v. Duluth**, 31 BRBS 75 (June 26, 1997). While there are cases that suggest that a claimant should not be considered permanent if further treatment is going to be undertaken, those cases are suggesting that the possibility of success exists. **See Louisiana Ins. Guaranty Assoc. v. Abbott**, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), **aff'g.** 27 BRBS 192 (1993)(BRB upheld ALJ's conclusion that physician's retrospective determination of maximum medical improvement was not acceptable, for physician had continued to treat claimant beyond the chosen date, with an eye towards improving his condition, and only later determined that the claimant was not going to improve); **Diosdado v. New Park Ship Building & Repair, Inc.**, 31 BRBS 70 (June 10, 1997) (BRB upheld ALJ's date of maximum medical improvement based on continued treatment by physician of claimant's back injury, including physical therapy). There is nothing in the medical evidence to suggest that the claimant's receipt of a total knee replacement represents a "success" in terms of his condition, according to the Employer which also relies upon the specific directions of the Board as follows:

"The fact that claimant had surgery…does not preclude the possibility that claimant's condition had been permanent during an earlier pre-surgical period of time. **See generally Leech v. Service Engineering Co.**, 15 BRBS 18 (1982) (permanent partial disability lapses during subsequent period of temporary total disability, but does not disappear). Moreover, the mere fact of surgery does not compel the finding that claimant's condition is temporary, although the evidence may warrant such a finding. **See Kuhn v. Associated Press**, 16 BRBS 46 (1983); **see also Bunge Corp. v. Carlisle,** 227 F.3d 934, 34 BRBS 79 (CRT)(7th Cir. 2000); **Worthington v. Newport News Shipbuilding & Dry Dock Co**., 18 BRBS 200 (1986); **White v. Exxon Corp.**, 9 BRBS 138 (1978), **aff'd mem.**, 617 F.2d 292 (5th Cir. 1982).

"In **Leech v. Service Engineering Co**., cited by the BRB, the claimant was seeking payment of survivor's benefits, in addition to the disability benefits the decedent was due during his lifetime. The BRB found that the decedent's condition had reached a point of maximum medical improvement and permanency prior to a temporary aggravation of his back condition. The decedent had actually been assessed 10 percent permanent partial disability prior to the

aggravation. The BRB stated that this finding "presupposed that claimant would retain at least a 10 percent partial disability, even though his condition might deteriorate either temporarily or permanently." The BRB held:

> [A]lthough a temporary total award will subsume a permanent partial award for the same injury, an underlying permanent disability does not disappear during periods of temporary exacerbation. It stands to reason that if claimant is adjudged to have reached a state of permanent disability, a subsequent temporary exacerbation will not necessarily alter that finding.

Id. at 22.

In this case, Dr. Wickenden, the Claimant's treating physician, specifically found as of January 9, 1998 that the Claimant had reached maximum medical improvement and that the Claimant had permanent impairment of function in his knees. He placed permanent restrictions on his activities. EX 4. Dr. Wickenden was aware that the claimant was likely to need a total knee replacement in the future, CX 12, but nevertheless found the claimant to be at a point of maximum medical improvement. Dr. Wickenden assessed the claimant's permanent impairment on April 23, 1998, further supporting a determination that the claimant was permanently disabled. CX 12. Dr. Christopher Brigham also opined in his November 9, 1998 records review that the claimant was at a point of maximum medical improvement and was permanently impaired. EX 10. No contrary medical evidence was presented, according to the Employer.

As in **Leech**, this Claimant will always maintain a certain level of permanent impairment. There is no evidence to support a finding that the level of permanent impairment will be reduced when the knees are replaced with prosthetics. Unlike in **Leech**, however, this Claimant did not suffer an exacerbation or aggravation of his medical problem, but rather has faced an essentially inevitable step in an already permanently deteriorating condition. Replacing the Claimant's knees with prosthetics will not change the underlying permanent nature of the Claimant's condition, nor leave the claimant without restrictions. It is in essence a palliative treatment, not intended to cure the Claimant's condition, but rather, as a last resort, to provide him with some symptom relief. That prospect, no matter how immediate, does not change the fact that the Claimant's condition has been permanent since at least January of 1998, when Dr. Wickenden found the Claimant to be at a point of maximum medical improvement.

It is still my judgment that Claimant, as of the time of the April 19, 2000 hearing before me, had still not reached maximum medical improvement. However, this Administrative Law Judge,

having been prompted by the Board, now finds and concludes that Claimant reached maximum medical improvement on January 8, 1998 and that he has been permanently and totally disabled from January 9, 1998, according to the well-reasoned opinion of Dr. Wickenden, Claimant's orthopedic physician.

With reference to Claimant's current disability and to his residual work capacity, it is well-settled that an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980). The proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior

Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law in the First Circuit that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternative employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken herein and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

Claimant submits that he is totally disabled because Bath Iron Works failed to show the availability of suitable alternate employment.

No one disputes that Claimant is not able, within his current restrictions, to return to the job he was doing when he developed problems with his knees. He clearly cannot work on his knees hauling cables up from the lower levels of the ships. Consequently, Bath Iron Works has the burden of proving that there is suitable alternate employment for Claimant. **Air America, Inc. v. Director,**

OWCP, 597 F.2d 773; 10 BRBS 505 (1st Cir. 1979)[5] In an attempt to show this, they hired Arthur Stevens to do a labor market survey. I originally held that this labor market survey did not meet the burden of showing suitable alternate employment because a labor market survey must provide detailed information about specific openings. It must show the hours, wages and that the conditions are within the employees restrictions. **Bunge Corp. v. Carlisle**, 227 F. 3d 934, 34 BRBS 79, 83-85 (CRT) (7th Cir 2000) (Court adopted burden of proof as defined by **Air America**, but held that the employer's labor market survey had not met that burden because it lacked sufficient detail about the identified jobs). **Royce v. Erich Construction Co**., 17 BRBS 157 (1985); **Kimmel v. Sun Shipbuilding**, 14 BRBS 412 (1981). A labor market survey based on faulty assumptions about the claimant's work capacity, does not establish the existence of suitable alternate employment. **Pietrunti v. Director, OWCP**, 31 BRBS 84 (CRT) (2nd Cir. 1997). An employee can rebut a showing of suitable alternate employment by showing that he looked for jobs and was not able to find them. **Palombo v. Director, OWCP**, 25 BRBS 1 (CRT) (2 Cir. 1991)

The Administrative Law Judge previously found that the Labor Market Survey was lacking because it did not provide enough detail about enough jobs to establish that they were realistically available. Claimant submits that this finding should be affirmed because it is supported by the evidence in the record. The Labor Market Survey contained jobs that were merely listed in the classified ads, and other jobs had no specific information about wages and hours. Also, Mr. Stevens began with a faulty set of assumptions about Claimant's work limitations. He states in his deposition that he interpreted the restriction against prolonged sitting and/or standing to mean that Claimant could sit and stand two hours or more at a stretch. However, Dr. Wickenden made it clear in his deposition that no prolonged standing or sitting meant no more than an hour, according to the Claimant.

Secondly, Claimant has introduced evidence that rebuts the labor market survey. First, he himself contacted some of the most likely employers, in particular, MBNA. He discovered that the security jobs would require a great deal of walking and stair climbing. Finally, and most persuasively, Dr. Wickenden testified based on the experience of his other patients, that jobs such as

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[5]This case arises in the jurisdiction of First Circuit and is therefore governed by the **Air America** case which held that the employer does not always have the burden of showing suitable alternative employment, if the facts of the case show that it is obvious that the employee could find some work. The Board has applied Air America in cases arising in the First Circuit. **Dixon v. John Jay McMullen & Associates**, 19 BRBS 243 (1986).

the security job at MBNA or a greeter at Wal-Mart, in fact require a great deal more standing and walking than Mr. Stevens reported in his survey, and more than Claimant can tolerate.

Claimant further submits that, given that this rebuttal evidence shows that the most promising of the job opportunities identified in the labor market survey are not in fact suitable, it casts doubt on the validity of all of Mr. Stevens' opinion and his entire report. Consequently, Claimant requests that this Court affirm this Judge's finding that the Employer has not met its burden of showing the existence of suitable alternate employment.

On the other hand, the Employer agrees that once a claimant establishes that he is unable to perform his usual employment, the burden shifts to the employer to demonstrate the availability of suitable alternate employment (**see New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981); **Crum v. General Adjustment Bureau**, 738 F.2d 474, 16 BRBS 115 (CRT) (D.C. Cir. 1984), **rev'g in part**, 16 BRBS 101. "In order to meet this burden, employer must show the general availability of job opportunities within the geographical areas where the claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing." **Sketoe v. Dolphin Titan International**, 28 BRBS 212, 223 (Sept. 15, 1994); **see also Avondale Shipyards, Inc. v. Guidry**, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1991); **P & M Crane Co. v. Hayes**, 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991); **Ion v. Duluth**, 31 BRBS 75 (June 26, 1997). Claimant can rebut the employer's showing of availability of suitable alternate employment, by showing that he diligently pursued alternate employment opportunities, but was unable to secure a position. **Ion v. Duluth**; **Palombo v. Director, OWCP**, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); **Newport News Shipbuilding & Drydock Co. v. Tann**, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988).

In this case, the Employer concedes that Claimant is unable to return to his work as an electrician at Bath Iron Works and that the Claimant had established his **prima facie** case for total disability benefits. The Employer, however, submits that it has rebutted the Claimant's **prima facie** case by producing evidence of suitable alternate employment. This evidence was in the form of a Labor Market Survey prepared by Mr. Stevens and the corresponding deposition testimony of Mr. Stevens. **See** EX 6 and 15.

The Direct Employer Contact section of the survey specifically identifies the date of contact; the employer and location; the telephone number and contact person; the job openings and qualifications for same; whether the job was part or full-time; salary amounts, if available; benefits; and physical requirements of the position. The survey also specifically identifies those jobs for which Mr. Stevens actually visited the job site and

observed the position being performed. The Job Analyses section of the survey sets forth Mr. Stevens' observations relative to the physical demands of the position and the working conditions, as well as identifying the general education necessary and the job training time. EX 6 at 49-68.

As already noted above, the Benefits Review Board specifically identified five part-time jobs for consideration on remand, namely cell phone sales at U.S. Cellular, EX 6 at 15, 53; video store clerk jobs at Movie Gallery, EX 6 at 16, 54, and Video Gallery, EX 6 at 55; cashier at Puffin Stop, EX 6 at 21, 63; and store clerk at the Big Apple, EX 6 at 32, 66. Four of the five positions were listed in the Direct Employer Contacts section of Mr. Stevens' survey, and all positions were observed by Mr. Stevens. EX 6 at 53, 54, 55, 63, 66. All five jobs were within an eight-mile commute of Claimant's home, and Mr. Stevens found all five jobs to be appropriate for the Claimant. **See** CX 15 at 10, 18-20. Of those five positions, Dr. Wickenden was asked about three of them, the cashier and video clerk jobs, and agreed the Claimant should be able to perform the requirements of those positions. CX 14 at 28-29.[6]

The Employer also concedes that Dr. Wickenden was not specifically asked about the other two jobs; however, a review of the job descriptions and analyses contained in the Labor Market Survey verifies that both positions are within the Claimant's physical restrictions. The U.S. Cellular job allowed for the ability to change positions as needed, with sitting or standing optional. There was no lifting or computer use required. EX 6 at 15, 53. The store clerk position at the Big Apple also noted the ability to change positions as needed, with both sitting and standing at the option of the employee. This employer offered the use of a high stool and indicated that accommodations could be made for physical limitations. The job required only very light lifting (under 10 pounds), no computer usage, and no kneeling. EX 6 at 32, 66.

Employer submits that the Claimant had the opportunity to rebut the employer's evidence of suitable alternate employment with evidence of a diligent but unsuccessful work search. The Claimant failed to do so. His testimony provided specific evidence of only one employer contact subsequent to his review of the Labor Market

[6] It should be noted that Dr. Wickenden was actually asked about the Puffin Stop cashier position located on page 59 of EX 6; however, this job description is identical to the Puffin Stop position referenced by the BRB and located at pages 21 and 63 of EX 6. Likewise, Dr. Wickenden was asked about the Video Galaxy position, but the Movie Gallery position description is identical in substance. **Compare** EX 6 at 54 and 55.

Survey, and there was no evidence of any contacts prior to that point. The only employer contacted was MBNA. The Claimant's inquiry ended by being told by the woman who answered the phone that he would not be able to do all the walking involved. Tr. at 25.

Employer points out that the Claimant has failed to produce any evidence of a work search, other than his one call to MBNA. Though he testified that he contacted other employers after receiving a copy of the Labor Market Survey, he provided no actual testimony relative to which employers he contacted or the results of those inquiries. Tr. at 28. He further testified that he did not inquire through the Union at Bath Iron Works regarding the availability of work, nor did he inquire directly with Bath Iron Works regarding the availability of work. Tr. at 29. He specifically testified that his last contact with BIW regarding the availability of work was shortly after his arthroscopic surgery in June of 1997. Tr. at 30.

Finally, the Employer submits that, without evidence of a diligent work search by the Claimant, the Employer's evidence of suitable alternate employment supports a finding in favor of the employer. The Claimant has failed to sufficiently rebut the Employer's evidence in this case, and, therefore, a finding of partial incapacity is warranted.

This Administrative Law Judge, having reconsidered the evidence on this issue and having been prompted by the Board's specific directions herein, now accepts the merits of the Employer's labor market survey fur the following reasons.

As indicated above, Employer has offered a Labor Market Survey (EX 6 and CX 15) in an attempt to show the availability of work for Claimant in cell phone sales and as a video store clerk and as a cashier at Puffin Stop and as a store clerk at the Big Apples. I accept the results of that very thorough survey which consisted of the counselor making a number of telephone calls to prospective employers. The report clearly refers to personal contacts with area employers, and Mr. Stevens contacted these employers by telephone, and he also visited the job sites to observe the working conditions to ascertain whether that work is within the doctor's restrictions and whether Claimant can physically do that work.

It is well-settled that Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**,

7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

The Labor Market Survey and the addendum (EX 6 and CX 15) are relied upon by this Administrative Law Judge for the further reason that there is complete information about the specific nature of the duties of those jobs identified above as constituting suitable alternate employment, and I am able to conclude that work is within the doctor's physical restrictions. Thus, this Administrative Law Judge concludes that the Employer has satisfied its burden of showing the availability of suitable alternate employment. Moreover, I find and conclude that Claimant has not made a diligent and good faith effort to return to work.

I am cognizant of the fact that the controlling law is somewhat different on the employer's burden in the territory of the First Circuit when faced with a claim for permanent total disability benefits. In **Air America, Inc. v. Director, OWCP**, 597 F.2d 773, 10 BRBS 490 (1st Cir. 1978), the United States Court of Appeals for the First Circuit held that it will not impose upon the employer the burden of proving the existence of actual available jobs when it is "obvious" that there are available jobs that someone of Claimant's age, education and experience could do. The Court held that, when the employee's impairment only affects a specialized skill necessary for his pre-injury job, the severity of the employer's burden had to be lowered to meet the reality of the situation. In **Air America**, the Court held that the testimony of an educated pilot, who could no longer fly, that he received vague job offers, established that he was not permanently disabled. **Air America**, 597 F.2d at 778, 780, 108 BRBS at 511-512, 514. Likewise, a young intelligent man was held to be not unemployable in **Argonaut Insurance Co. v. Director, OWCP**, 646 F.2d 710, 13 BRBS 297 (1st Cir. 1981).

In view of the foregoing, I accept the results of the Labor Market Survey because, with the required information about each job, I conclude that these jobs constitute, as a matter of fact and law, **suitable** alternate employment or **realistic** job opportunities. In this regard, **see Armand v. American Marine Corporation**, 21 BRBS 305, 311, 312 (1988); **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). **Armand** and **Horton** are significant pronouncements by the Board on this important issue.

Accordingly, as the Employer’s Labor Market Survey has established that Claimant is partially disabled on and after February 18, 2000, the date of the Labor Market Survey, Claimant,

pursuant to the well-settled **Pepco** doctrine, is limited to the permanent partial disability benefits established by the doctor's impairment rating.

While the Employer has relied upon and paid Claimant the rating suggested by Dr. Brigham, I do not accept that rating as it is entirely too conservative. I instead accept the rating of Dr. Wickenden, Claimant's treating physician for many years. Dr. Wickenden is in the best position to observe Claimant's impairment, as opposed to the examination by Dr. Brigham **solely** for litigation purposes.

Accordingly, I find and conclude that Claimant's bilateral impairment of his lower extremities may reasonably be rated at twenty-one (21%) percent and that benefits for such impairment shall commence on February 18, 2000, the date on which the Employer established that Claimant is partially disabled.

As the Board points out, Claimant is entitled to an award of total disability benefits while undergoing bilateral knee replacements and recuperating therefrom. However, this closed record does not reflect those time periods. The parties shall confer on these closed time periods and shall submit those to the District Director for her consideration. If the parties cannot agree on these periods, Claimant may submit these as part of a timely filed **Motion for Reconsideration** and Employer's will have seven (7) days to file a response thereto.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury in a timely manner and requested appropriate medical care and treatment. The Employer shall continue to pay Claimant’s reasonable and necessary medical expenses relating to his bilateral knee problems.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review

Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer, although initially controverting Claimant's entitlement to benefits (RX 2), nevertheless has accepted the claim, provided the necessary medical care and treatment, voluntarily paid compensation benefits for certain time periods and controverted his entitlement to further benefits. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Attorney's Fee

Claimant's attorney, having again successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer as a self-insurer. Claimant's attorney has not submitted her fee application. Within twenty (20) days of the receipt of this Decision and Order, she shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's counsel who shall then have ten (10) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred between the date of the informal conference and the date

of this Judge's Decision on Motion for Reconsideration, and between the date of the Board's decision and the date of this decision. Services performed outside of those dates should be submitted to the District Director and to the Board for their consideration.

AMENDED ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for his temporary total disability from June 26, 1997 through January 8, 1998, based upon an average weekly wage of $716.59, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on January 9, 1998, and continuing until February 17, 2000, the Employer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $716.59, such compensation to be computed in accordance with Section 8(a) of the Act.

3. The Employer shall also pay to Claimant compensation for his twenty-one (21%) percent permanent partial disability of the left lower extremity, based upon his average weekly wage of $716.59, such compensation to be computed in accordance with Section 8(c)(2) of the Act and shall begin on February 18, 2000.

4. The Employer shall also pay to Claimant compensation for his twenty-one (21%) percent permanent partial disability of the right lower extremity, based upon his average weekly wage of $716.59, such compensation to be computed in accordance with Section 8(c)(2) of the Act and shall begin on February 18, 2000.

5. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his April 2, 1997 injury.

6. The Employer shall also pay to the Claimant compensation for his total disability while undergoing bilateral knee replacement surgery and while recuperating therefrom. The parties shall agree on those closed periods of time and submit those to the District Director for her implementation. Otherwise, Claimant shall submit those as part of a timely motion for reconsideration and the Employer shall have seven (7) days to file a response.

7. Interest shall be paid by the Employer on all accrued

benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

8. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries referenced herein may require, subject to the provisions of Section 7 of the Act.

9. Claimant's attorney shall file, within twenty (20) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have ten (10) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred while the matter was pending before the Office of Administrative Law Judge.

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DAVID W. DI NARDI
District Chief Judge

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